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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 194

ANGELINE DEBARTOLO,

Petitioner,

vs.

VILLAGE OF OAK PARK, A MUNICIPAL CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

Believing that a few paragraphs directed toward clarification of the issues and questions discussed will be helpful to the Court, we make these suggestions:

I

The Court Has Jurisdiction to Review

The respondent Village while seeking to deny jurisdiction of this Court to consider this case has actually conceded it. It is stated on page 24 of the Brief of the respond-

ent Village that this Court has taken cases where a Federal question has been raised by a general allegation that a statute is unconstitutional. If so, jurisdiction exists here, where the allegation is *specific.*

The constitutional question was raised in this case in the trial court. That question of constitutionality is what the lawsuit was about. That was the very basis of the complaint, and the substance of the issue.

The complaint says (Tr. 4) that the action of the Village officials in denying plaintiff a permit to complete her building according to the plan submitted

> "is illegal and in total disregard of plaintiff's rights in her property, and in contravention and in violation of both the State and *Federal* constitutions."

Provisions of the Fourteenth Amendment of the Federal Constitution Are Directly Set Forth

Again in the Complaint (Tr. 9) it is alleged that the said zoning ordinance, insofar as it prohibits the use of plaintiff's house as a two-family residence,

> "takes and damages property of plaintiff without compensation, and deprives the plaintiff of her liberty and property without due process of law, and denies to the plaintiff equal protection of the laws, and is therefore unconstitutional and void insofar as it so operates."

The Court will note that the pleader had his eye on the Federal Constitution for that is the language of the Fourteenth Amendment, phrased to fit the allegation of unconstitutionality of the Ordinance, as interpreted and administered by the Village officials. The wording of the Fourteenth Amendment is

> "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to

> any person within its jurisdiction the equal protection of the laws" (U. S. Constitution, Amendment XIV).

The Illinois Constitution of 1870 says nothing about denying "equal protection of the laws." Its Bill of Rights provides only against lack of "due process of law" (Illinois Constitution, 1870; Art. II, Section 2). So necessarily the complaint is based on the Federal Constitution.

The respondent Village in its answer to the Complaint denied that the Village officials in refusing to grant the requested permit acted

> "illegally and in contravention and in violation of both the State and Federal Constitutions" (Tr. 12, par. 11).

So the respondent Village knew the Federal Constitution was relied upon. And again in paragraph 24 of its answer the respondent Village denies that it takes plaintiff's property without due process of law.

In relying on such cases as *Zahn* v. *Board of Public Works*, 274 U. S. 325 and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, it is obvious that respondent was attempting to meet the Federal question raised.

The Decree Holds the Zoning Law as Applied to Plaintiff's Property to Be Unconstitutional

The decree of the trial court finds "that all of the material allegations in the complaint in this cause have been proven" and adjudicates that the zoning ordinance, as applied to plaintiff's property, insofar

> "as it operates to deprive plaintiff from using her property as a two family residence is unconstitutional and void" (Tr. 20).

The complaint was not alone that the ordinance and its enforcement as to plaintiff's property was "invalid" but

that the *invalid enforcement* of the ordinance took plaintiff's property without due process and denied plaintiff the equal protection of the law. That was the claim of unconstitutionality then made and which raised the Federal question throughout the litigation.

The Supreme Court of Illinois reversed the decree. The effect of that judgment was to deny the claim of invalidity under the Federal Constitution. The cases cited in respondent's brief refer to writs of error. None involve restrictions by zoning ordinances, which, of their very essence, are an intrusion on the right to property and to the equal protection of the laws guaranteed by the Federal Constitution. Thus it is unnecessary to show further the erroneous conclusions sought by respondent to be drawn from those cases.

Nevertheless, it is to be noted that in *New York, ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 66, this Court says:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

From the showing in the case at bar, coupled with the absence from the State Constitution of an equal protection of the laws clause (as was noted by the Court in the *Bryant* case) it is apparent that the claim of invalidity by reason

of the restriction in the ordinance when applied to plaintiff's residence, as being repugnant to the Fourteenth Amendment, was presented to the Illinois Supreme Court, and that by its decision, it was upheld against that claim.

This Court will be clearly within its jurisdiction in granting certiorari to review this record.

II

Petitioner Is Not Now, and Never Was, Elsewhere, Urging That the Oak Park Zoning Ordinance Is Void Generally; Nor Is Petitioner Abandoning the Issues in Her Complaint That the Restriction in the Ordinance Is Void as Applied to Her Existing Building.

The cases cited by respondent deal with the general power to enact zoning ordinances (Respondent's brief, pp. 8-12). They do not require further reply as they do not involve particular restrictions, and their application to buildings existing before the ordinance was enacted.

The issue in this case is most clear. Petitioner is the owner of an existing building, in a fully built-up district, which has never been strictly devoted to one-family residences. (This is not the case of an owner of a *vacant lot*, in a strictly residential zone, seeking to erect on it what is generally understood to be a *2-apartment building*.) Petitioner *is permitted under the ordinance*, to complete as requested the available second floor space with the two additional rooms, and with dormer window, in accordance with the plan proposed. This is not denied by the Village. No problem is presented as to whether the upstairs is adaptable to the rooms as planned. Therefore, the reference by the Village (p. 14) to the Illinois Supreme Court's erroneous conclusion as to the *adaptability for the rooms* merits no reply here. That is not the matter in dispute. The only prohibition made by the restrictive provision of the or-

dinance and as thus construed and applied by the Village to the petitioner's building is that, one of the rooms, after completed as planned and allowed under the ordinance, may not be used as a kitchen. This, they say, is because the "cooking together" provision of the ordinance would otherwise be violated. What then is the issue? What is the *matter in controversy in this case* as to this specific residence, if it be not the prohibited use of one of the rooms as an *additional kitchen*? Nowhere has respondent attempted to justify the restriction as here applied, on any basis of public health, morals, safety or general welfare.

Opposing counsel say petitioner has abandoned supposed complaints, (1) that the ordinance was invalid because of nearness to a commercial zone, and (2) because of the presence of other apartment buildings in the area; but the respondent has not pointed out where in the complaint it is so stated. But there never were any such claims made in the complaint that the ordinance was void for such reasons, or for any other reason than that it was void *in the application of it to plaintiff's property.* Such matters were never abandoned for the simple reason that they were never asserted. Those matters were evidentiary only and incidental to the picture. The supposed contention would only exist if there was an attack on the general ordinance and if there was in question the right to zone the area; and the complaint would be applicable to every piece of property in the area.

The petitioner does not assert, and never has asserted, that the zoning ordinance is void generally. It would be idle to advance such propositions as controlling under the contention that petitioner's rights were being taken under the guise of the police power by denying her a permit to finish the upstairs of her building with a kitchen, while the two rooms, as planned, are admittedly allowed. It is the denial of permission to complete her house so as to accommo-

date the persons, permitted under the ordinance, that is the burden of petitioner's complaint. The construction of said ordinance by the Village is in effect and in reality a prohibition against the extra kitchen. This, she alleges, is the taking of her property in violation of the Federal Constitution. That is the proposition urged here, and the only one ever urged.

Petitioner is not seeking to rezone her property. She asked for a permit to finish the building with the extra kitchen on the theory it was her right. The building commissioner denied the permit. The zoning board was appealed to and it denied the request. The Village Board of Trustees supported the officials, and this suit to compel a permit was then filed.

It has been consistently urged that the acts of the officials were so arbitrary and unreasonable as to destroy petitioner's right to a legally permissible use of her property and that such construction of the ordinance violated both Federal and State constitutions.

That proposition has been continuously urged. That proposition has never been abandoned. That proposition is still the basis of this certiorari application. This is the kind of case contemplated in the decision of *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 397, where this Court stated that while it was determining that the general ordinance there involved was a valid exercise of authority, it was "*leaving other provisions to be dealt with as cases arise directly involving them.*"

The case at bar is the first case to reach this Court involving the "cooking together" restriction as applied to an existing building; it is in this that the Village goes too far, namely, *where the only matter in controversy* is the right to have *an additional kitchen.* Nothing more was shown to be involved in this case.

III

The Complaint, and the Decree of the Trial Court, Reflects That the Attack Upon the Ordinance Is Only as to Its Application to Plaintiff's Property, and That the Ordinance Was Not Attacked Generally.

The contention of the respondent Village that the principal issue tried concerned the commercial zoning of adjoining territory, and the presence of multiple buildings in the area in question, is wholly without foundation. There was no such issue formed or tried. It is a feigned issue used to divert argument away from the real issue, the taking of plaintiff's property rights by denying the right to complete her building with a kitchen upstairs. The Village attempted to thus make of the case at bar a wholly different case on the appeal, in order to make it fit the rules concerning the general power to zone *vacant* areas. This was pointed out to the Illinois Supreme Court, and in the Petition for Rehearing. That contention, by the Village, caused the Supreme Court of Illinois to err in its decision, as is evident from the opinion of said Court in this record.

There is no such claim of invalidity made in the complaint. The complaint is based upon the refusal of the Village to give a permit to complete the building because the plans included a kitchen so as to accommodate a second family unit. That is the only charge of invalidity or unconstitutionality.

While there are allegations in the complaint descriptive of the zoning area in question and adjoining areas, it is not alleged that the zoning ordinance is invalid for those reasons. Those allegations merely accentuate and emphasize the unreasonableness of the Village in the position it takes with reference to the proposed use by petitioner of her existing home, in that the Village says, in effect, that the

use of one of the permitted rooms as a kitchen would violate the "single housekeeping" and "cooking together" restrictions in the ordinance and, they state, would "destroy the neighborhood" (Tr. 14).

The substance of the complaint is reflected in certain paragraphs of the complaint which for certainty we quote:

> "16. That by said zoning ordinance, the defendant, although it does not limit the number of rooms, or the number of persons that may occupy a single structure, the Village of Oak Park is attempting to, and compelling plaintiff, to restrict use of said property to 'only one family' " (Tr. 6).
>
> "17. That the word 'family' is defined in said zoning regulations, Section 35.09 (26) as follows:
>
> " 'A family is any number of individuals living and cooking together on the premises as a single housekeeping unit' " (Tr. 6).
>
> "24. That the said zoning ordinance, insofar as it prohibits the use of plaintiff's real estate as a two-family residence, as aforesaid, takes and damages property of plaintiff without compensation, and deprives the plaintiff of her liberty and property without due process of law, and denies to plaintiff equal protection of the laws and is therefore unconstitutional and void insofar as it so operates" (Tr. 9).

The prayer of the complaint is that the officials be required to issue a permit to finish the upstairs as a separate apartment; that the officials be enjoined from enforcing the said ordinance insofar as it prohibits the use by petitioner of *her house as a two-family dwelling;* and for an adjudication that the zoning ordinance is invalid and void "in its application to this property" (Tr. 10).

The decree of the trial court specifically adjudicates that it is the denial of the right to finish the building as requested

that creates the unconstitutionality of the ordinance. We show the provisions of the decree.

The decree (Tr. 15-21) specifically finds as follows (Tr. 19, par. 8):

> "8. The court further finds that there will be no material or substantial change in the plaintiff's property structure or outward appearance, in allowing plaintiff to complete the construction of an apartment on the second floor of her property at 1181 S. Lyman Avenue, Oak Park, Illinois; and, while it will enhance the value of the property of plaintiff, and improve the same to its highest and best purpose and urgent need, it will not in any wise or manner affect the character of the neighborhood, or decrease the value of the premises nearby or in the vicinity."

And in paragraph 9 (Tr. 19) the decree finds that the restrictions enforced upon plaintiff's property by the respondent Village, prohibiting the use of *her house for two families.*

> "are not necessary to the end that adequate light, pure, air, safety from fire, and other dangers may be secured."

The decree then adjudicates that the said zoning ordinance operates to deprive plaintiff of using her house for two families and is therefore

> "unconstitutional and void, and therefore the same is invalid and of no effect in law in its application to plaintiff's property" (Tr. 20).

The court then enjoins the enforcement of the ordinance as against the plaintiff's property and directs a permit be given allowing the completion of the building (Tr. 20-21). From this condition of the record it can be seen that the Supreme Court of Illinois based its opinion upon an erroneous conception of the issues in the pleadings.

In the petition for rehearing filed in the Supreme Court it is pointed out to the Court that the Court had decided the case upon an immaterial issue, feigned by the respondent Village, and that there was really "only one question for consideration" and that was whether the plaintiff had a right to complete her house and whether the denial of such right by enforcing the restrictive provisions of the ordinance *as to one kitchen* "was unreasonable, discriminatory, and therefore unconstitutional" (Tr. 76-77).

The Supreme Court of Illinois in upholding the ordinance, necessarily held that its enforcement against plaintiff's property was not unconstitutional, and did not deprive plaintiff of her property without compensation, nor deprive her of her right to the equal protection of the law; and did not deprive plaintiff of her rights under any constitution, Federal or State, as alleged and claimed by respondent Village.

By putting the decision upon a supposed issue which was not in the case the Supreme Court did not dispose of the case on local law for it never was the issue that the ordinance was "invalid" generally, but always that its enforcement took petitioner's property without compensation and without due process of law, and denied to plaintiff the equal protection of the laws.

IV

Unnecessary and Unreasonable Restrictions Upon Family Life Cannot Be Justified Under the Guise of Police Power.

We think the respondent Village concedes the point made that the zoning of residential territory by restrictions upon family life and its conveniences *inside the residence*, is arbitrary, and unreasonable when enforced so as to deprive a family of the usual conveniences of American life; that

is to be deduced from the claim of the Village that the Supreme Court of Illinois has never decided that a family *may not have* more than one kitchen in a one-family dwelling "any more than one bedroom or one bathroom, or one dining room" (Brief of Respondent, page 19).

True, the Supreme Court of Illinois has never so decided, *but* it has decided the very *converse* that where a building in a one-family zone is adaptable to more than one family unit, and so allowed to be used under the ordinance, it is unreasonable to restrict the building to one kitchen for the "family" group where the ordinance defines a family as "any number" of persons living and cooking together on the premises (*Harmon* v. *City of Peoria*, 373 Ill. 594). Respondent says that in the *Harmon* case it was a typical "rooming house" block. But we have shown that the provision of the ordinance as to roomers in that case, and the case at bar are identical. Under the ordinance, plaintiff's property is in just as typical a "rooming house" block. We have shown in the petition, the basis of the Court's holding in that case, as also the other cases, so that it is unnecessary to repeat it here.

Where can there be a violation of the zoning ordinance, *if it is now conceded that two kitchens are permitted,* when the residence building is used inwardly for the very purposes indicated by its outward appearance, *and the ordinance prohibits nothing else sought to be done by petitioner?*

The petitioner's building, under the proposed use, will *still be a residence* with rooms upstairs. That the three rooms with the kitchen, now conceded within petitioner's rights, might be referred to as a separate apartment, will not make of the structure what is commonly known as a two-apartment building. Nor has it been claimed or shown that any question of light or air, or any other element is

here involved, pertaining to the public welfare—the basis and support of zoning restrictions, and as might well be the situation in the erection of a *two-apartment building on a vacant lot.*

Of course all members of the family, regardless of the hardship imposed, may be able to convenience themselves with one kitchen, and so appease the Village fathers, but how much more convenient, necessary and rightful is it, to have an extra kitchen, when no one is in fact harmed. It is the same group living in the same house, extra kitchen or no extra kitchen.

Certainly there is no discernible relation between such restriction and the police power.

Obviously the zoning of territory to be built up with dwellings arranged and designed for the exclusive use of only one "family" being "any number of individuals living and cooking together on the premises as a single housekeeping unit" is unreasonable *when the test applied* depends *only* upon whether those "any number" of persons can have more than *one kitchen in which to cook;* for whether such a family breaks up into separate units, or family groups, inside the house, and cooks and eats separately, or, collectively, cannot concern the Village officials. The definition is: "any number of individuals", and, naturally one would suppose such a family, more or less, is entitled to the usual family conveniences.

Counsel for the respondent Village say that the Illinois Supreme Court has never at any time placed the construction of unreasonableness upon the creation of one-family residence zones, with kitchen facilities as the test of a one-family residence. It is not contended that it was so decided, as to the *creation of the zone,* but definitely the Supreme Court of Illinois has passed upon that question three times, in its application to *a specific existing building* in the area.

That point was definitely decided by the Illinois Supreme Court in *Harmon* v. *City of Peoria,* 373 Ill. 594 where it was held that under the same definition of "family" that three kitchens for three family units, in a building in a one-family residence zone, was no more inimical to public welfare than the same or greater number of persons permissible under the definition, living collectively with one kitchen. The same ruling was made in *Merrill* v. *City of Wheaton,* 356 Ill. 457, where that question only was presented, and *Anderman* v. *City of Chicago,* 379 Ill. 236.

The *zoning* of the territory was not held void in those cases, but as applied and enforced as to houses existing before the enactment of the ordinance, the Supreme Court of Illinois definitely said that an ordinance which permits an unlimited large group of people to live under one roof, and yet does not permit them to break up into family units *with a kitchen* for each group, is arbitrary and unreasonable; that is, when it restricts the grouping of separate units for family life.

In other words, the Supreme Court of Illinois has said that, where there is a building existing before the ordinance, in a one-family building zone, so constructed and allowed to be used for more than one family unit, and the number of persons who may live in it is unlimited, it is unreasonable to deny the normal use of the house for separate family units *by applying the "one-kitchen-to-a-family"* test. (*Harmon* v. *City of Peoria,* 373 Ill. 594). Counsel has not been able to show one case, and apparently none exist, in which was involved the application of a like ordinance to an existing building, where it was decided otherwise, by the Illinois Supreme Court, or in any other jurisdiction, or by this Court.

Opposing counsel say that there is nothing in the ordinance that says that "a family may use only one kitchen"

or a "single family being obliged to cook in one kitchen" (Respondent's Brief. p. 17). The ordinance says "cooking together." That provision has been interpreted by the Illinois Supreme Court in the cases cited, as "using a single kitchen for their needs." Moreover, the Village officials denied the permit because in the application and sketch there appeared a kitchen to be used with other rooms in the upstairs section, which is admittedly allowed to be used to accommodate a second family unit; so whether that language in the ordinance is susceptible of any other meaning or not, the Village officials by their construction of the ordinance, so apply it in the case at bar. If the "one kitchen" rule had not been thus applied by the officials there would have been no lawsuit. For there never was a denial, and there is no denial, of the right to complete the upstairs into rooms for living quarters. The ordinance does not prohibit it, and the respondent has nowhere denied it although we alleged it throughout this suit, and in this petition for certiorari before this Court (P. 30).

Surely it can be of no concern to the police power, or the Village fathers, just how the family shall dispose itself inside the building arranged with two kitchens, whether one group detaches itself and takes the upstairs portion or lives collectively with the others.

So what can be the difference, as affecting the public welfare, between a family group, living in a building with one kitchen and the same persons arranging themselves into two family groups, one upstairs, one down, with two kitchens?

No objection is now made to two kitchens for a family group, as we understand opposing counsel; what is objected by the Village is that the group must not separate itself in units and one group move upstairs and use the new kitchen while the other group remains on the ground

floor and uses the other kitchen. In other words they now say there must be a continuous intermingling of the persons, otherwise the public welfare will be endangered, and those persons may be unlimited in numbers—total strangers, roomers and boarders.

Speaking concretely the Village has no objections to building the extra rooms, and none to the daughter and son-in-law living in the house with the mother; but the objection is that the mother may not separate the use of the upstairs rooms, by there providing kitchen facilities; and shall not permit the new family unit to have the privilege of cooking, eating and housekeeping upstairs by themselves.

And that restriction is imposed by the Village officials under guise of the police power.

The Supreme Court of Illinois said in *Harmon* v. *City of Peoria,* 373 Ill. 594, that three separate kitchens was allright even to rent to strangers where, as here, no other prohibition was shown; but here, where the building and the ordinance will permit a separate unit upstairs, a permit is denied for the use of petitioner's daughter, and her ex-soldier husband, because a kitchen is to be installed as one of the rooms, *and for that reason only;* and that, too, where a kitchen was permissible in 1921, and this building was then in existence as now, when the ordinance was passed. *Of course the zoning ordinance did not and could not destroy that right.*

Under any view the action of the Village, through its officials, is wholly unreasonable and arbitrary and destroys a valuable property right in which petitioner should receive protection. The protection of that right to complete the building with the kitchen was claimed under the Federal Constitution and denied, and this Court has jurisdiction to right that wrong.

V

Petitioner's Claim Is That the Application of the "Family" Definition to Petitioner's Building Existing Before the Enactment of the Ordinance Is Arbitrary, Unreasonable and Confiscatory.

Opposing counsel say that the definition of a family as used in the Oak Park ordinance is one commonly used throughout the country in creating residential zones in zoning ordinances, and say that no case is cited by petitioner deciding that such a definition of a family is unreasonable.

The contention of petitioner is not that the ordinance definition of a family, artificial as it is, is unreasonable, nor even unworkable, as it may pertain to the erection of buildings after the enactment of the ordinance, and to control the height and width of new structures in zoned vacant areas, to be devoted strictly to one-family residences, and thus "creating" residential zones.

The complaint is that the application of that definition by the Municipal officers to houses found in single family zones, and existing before the ordinance, permitted and adaptable to the use of two or more ordinary every day American families, as we know them, is unreasonable when, as here applied, the restriction *is only against an additional kitchen,* and thus destructive of property rights.

It is that refusal by officials to permit the separation of the unclassified and unlimited number of persons, within the existing house, so as to make a reasonable use of the permitted interior arrangement of the house, that makes the ordinance unreasonable.

We assert that the application by municipal officials of such definition to houses adaptable and permitted to be used by two or more families, found in the one-family size, when the zone is created, whereby the officials refuse to per-

mit, in such a house, the installation of cooking facilities, for the separate ordinary and permissible family units, has been condemned by the Illinois Supreme Court in *Harmon* v. *City of Peoria,* 373 Ill. 594, *Merrill* v. *City of Wheaton,* 356 Ill. 457, and *Anderman* v. *City of Chicago,* 379 Ill. 236. If such artificial classification does not fit existing conditions, the ordinance must give way.

A zoning ordinance is a most general thing in its applications to property, and the power to zone the territory, and control the height and size of buildings, after the ordinance, has no relation to the regulation or distribution of family life and its conveniences inside the house. Opposing counsel say that the reasonableness of the restriction, in common use throughout the country, has never been challenged (Resp. brief, p. 18). The inference, as pertaining to the case at bar, is that local officials are everywhere applying and enforcing it, as to all existing buildings, found in the territory, when the ordinance is enacted; and that as here applied by the Oak Park officials, namely—, *a prohibition against another kitchen* (for nothing else is prohibited in this case) *it is thus being applied everywhere.*

If that is so, then the question here presented as to whether the local officials *have not gone too far,* under the guise of police power, and whether the restriction as here complained of, is not repugnant to the 5th and 14th amendments, is obviously of great public concern. This question does not appear to have been heretofore passed upon by this Court, as respondent admits. Zoning cases which have been considered by this Court have involved the *general power* of the municipality to enact them, *in the zoning of an area.* (*Euclid* v. *Ambler Co.,* 272 U. S. 365). This case involves the validity of a restriction in the general ordinance, as applied by local officials to a specific existing building, in the area zoned. It is such a question as was

specifically reserved in the decision of the *Euclid* case (*Euclid* v. *Ambler,* 272 U. S. 365, 395-7).

The great importance of this Federal question is thus conceded, and the reason for this Court taking this case for decision is thus given additional emphasis.

We do not deem necessary, at this time, to point out to this Court, the many erroneous statements and conclusions of counsel for respondent, such as "that she occupied the house as a single family for 25 years" (Resp. brief P. 9); and other such statements, without any basis in the record therefor; and that, even if it were so, it would have no bearing on petitioner's claim for her Constitutional right.

It is necessary only to note that in other such instances where respondent makes such assertions, and chooses to state what the petitioner contends, there is a decided absence of any reference to the record where such facts or contentions are to be found.

Respondent sets out certain excerpts from the opinion of the Illinois Supreme Court in this case, and adopts them as "the facts". But, it is that opinion, and the judgment of said court, which this Court is here respectfully and earnestly asked to review. Nor, does counsel for respondent refer to such facts as—that within the year, prior to the suit, the Village board granted permits for use as separate apartments, in respondent's District "A" in seven instances, according to the record of the Village; to which respondent replied as being "irrelevant and immaterial", (Tr. 8, 14 Par. 23)—and other such facts not apparent in the opinion.

To what inconsistency, respondent's counsel has been led by the attempt to explain the cases cited by petitioner, is clear, when we note that respondent explains that the unconstitutionality was upheld in the *Anderman* case because the *tract was small,* and in the *Nectow* case, because the *tract was large.* (Resp. brief P. 20).

Counsel says that the testimony of one of the attorneys dealt almost entirely with the presence of dwellings and zones, to identify photographs, and that for this, the Illinois Supreme Court criticized him (Resp. brief P. 3). It is admitted then, that said testimony consisted of making formal proof of undisputed physical facts (Tr. 87). Other facts were stipulated. The provisions of the ordinance were before the Court. We find no prior case, where an attorney was thus criticized for making formal proof of this nature. Surely counsel does not infer that the attitude of the Illinois Supreme Court in this connection was any element in the reversal by it of the decree, and thus denied to petitioner the rights claimed by her and guaranteed to her under the Constitution of the United States.

VI

The Respondent Village Has Not Justified the Interpretation of Its Ordinance Whereby it Places Restrictions Upon Family Life.

It is suggested that the answer of the Village does not in any wise justify the zoning of its territory by restrictions upon family life or such application of its ordinances. For all that is said in defense of its application of its ordinances, it yet remains obvious that instead of promoting general welfare, health and morals, the application of its ordinances by the officials, as shown in this case, actually and in reality, restricts the general welfare, by allowing large unclassified groups to live as one family if they use one kitchen, but denying to the ordinary family of a few persons a permit to arrange separate housekeeping rooms for a new family unit of daughter and son-in-law, where the house existed when the territory was zoned; and where no other prohibition as to the rooms is claimed by the Village, or reason for refusal of the permit.

Public Convenience Is Involved

It is respectfully suggested that the present housing shortage could be largely relieved if a realistic, instead of an aesthetic approach, were made to the zoning problem. The time is passing where a municipality may compel life in a residence by a single family, if it ever could have done so. This, the Village understands it cannot do—the ordinance itself cannot and does not prohibit it—so they decide in this case, *they just won't let them have a kitchen.*

Space readily available in many houses can be used to accommodate additional family units, such as members of the family, upon marriage—daughters and sons, ex-service men, who are anxious to have their own modest quarters; and this without danger to the public welfare, or violating proper zoning ordinances.

It is suggested that public convenience will be promoted if this Court will consider the problem here presented.

Conclusion

We respectfully suggest that the question here presented is one which is as broad as the country, as opposing counsel admits; and one of which the Court should take jurisdiction to certify up for review, which is earnestly requested.

Respectfully submitted,

ODE L. RANKIN,
Attorney for Petitioner.